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THE USE OF INDEFINITE TERMS IN STATUTES*

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It is possible to distinguish roughly three grades of certainty in the language of statutes of general operation: precisely measured terms, abstractions of common certainty, and terms involving an appeal to judgment or a question of degree. The great majority of statutes operate with the middle grade of certainty. The language of the law always aims at precision, while the language of politics favors vagueness and ambiguity, for the former is chosen with a view to the ultimate arbitrament of a court of justice, the latter with a view to immediate effect upon sentiment or opinion. Some of the most general clauses of American constitutions are phrased politically rather than legally, but they are more legal in form than the Declaration of Independence; and the more recent American constitutions are written almost like statutes.

Abstractions of common certainty may be furnished by words of popular usage, by technical terms, or by circumscribing definitions. No general rule can be laid down as to which of these serves statutory purposes best, although a good deal might be said about the illusory certainty of some technical terms, and of cumulations and qualifica-

* This article is an attempt to work out, in a limited field, but in some detail, principles of law applicable to the framing of legislation, i. e., principles that should be observed in order to obtain a legally workable, not merely a constitutional, statute.

The legitimate province of such a legislative jurisprudence remains to be determined. The proper choice of terms is obviously one of its important problems; the choice of forms for legal acts another; the choice of methods of regulation a third. The propriety of using indefinite terms is part of the first problem.

tions sanctioned by traditional practice. Every common abstraction has its "marginal" ambiguity, which mere elaboration of definition cannot altogether remove.

The closest approach to certainty is found in precise measurement, where that form of expression is available. Matters of quantity and quality can often be dealt with in this manner. The law may speak of intoxicating liquors, or it may fix upon a percentage of alcohol. In the history of liquor legislation the more generic term has not been found altogether inadequate, while the superiority of the precise definition has to be paid for by the inconvenience of a more elaborate technical apparatus of administration and proof.

From the past and present practice of legislation we can learn a great deal as to the relative advantages of precisely measured terms and common abstractions, and the ways of handling either; but the considerations applicable vary too much from case to case to be summarized in comprehensive fashion.

It is otherwise with regard to the third class of terms, those representing the lowest grade of certainty, which may be characterized, if we think of them favorably, as flexible, if we think of them unfavorably, as indefinite. They involve either an appeal to judgment, or a question of degree. The former category is represented by such terms as reasonable, proper, sufficient, suitable, necessary; where they are used, flexibility is a deliberate object of legislative policy. The latter category is represented by such terms as nuisance, coercion, undue influence, immorality, depravity, reputability, sedition, unprofessional conduct, unfairness, unsightliness, restraint of trade; their choice is not so much matter of policy, as of inability to deal with a problem. Some of these latter terms have the sanction of common-law recognition, while others represent new standards of which the common law did not take cognizance. They fail to differentiate adequately either the province of morals or of social restraint from the province of law, or the province of the unlawful from that of the legitimate and even valuable. Both categories, considered from the point of view of justice, fail to give certain and equal operation, but on the other hand are more adaptable to varying circumstances than fixed terms. From the legislative point of view, facility of formulation counts in their favor. From the point of view of official administration and individual application, flexibility or indefiniteness has the double aspect of liberty and peril. Liberty means not only a desirable latitude of action, but also the temptation to take the benefit of the doubt; the peril lies in the risk of error and misjudgment and its attendant consequences.

It follows that in deciding upon the admissibility of flexible or indefinite terms, regard must be had to the circumstances under which, the persons by whom, and the sense of responsibility with which, the law will be applied, and to the consequences which an error will entail. Is there any risk of loss and on whom will it fall? Will it be the risk of a penalty? of unsettling title, securities, status rights, or public

revenues? a risk of damages? a liability to equitable or administrative order or injunction? the risk that favorable official action will be denied? the risk that a regulation or order will turn out to be invalid? or will the risk be merely the disappointment of an expectation?

The use of indefinite terms should therefore be studied according as they occur in penal legislation, in statutes creating civil liability, in laws affecting titles, in acts operating through equitable relief, and in grants of official power, and these categories will be taken up in succession.

I. PENAL LEGISLATION

(a) *Trade nuisances.* The law of nuisance is typical, because whatever may be proclaimed by abstract definitions, it is impossible to take a practical view of the law without making the degree of offensiveness a controlling factor. To make it, however, a matter of degree whether a valuable industry is legitimate or liable to be penalized, is so unsatisfactory a criterion in the administration of criminal justice, that the practical result will be either a toleration of technical nuisances or a substitution of more definite tests by regulative legislation. The common type of legislation has been that of licensing offensive or dangerous trades, or assigning places where they may be carried on, as was done in Massachusetts in 1785 and in England by the Public Health Act of 1848, revised in 1875.[1] The English Public Health Act deals with many things and conditions described as carried on or maintained "so as to be a nuisance," but with regard to many of these no penalty can be imposed under the Act except for contravention of specific orders.[2] The British Alkali Acts (1863 to 1906), although they do not dispense entirely with reference to 'nuisance' or practicability,[3] make an attempt to prescribe, as far as may be, specifically the conditions with which highly offensive and yet essential industries must comply.[4]

These acts expressly save any remedy by action, indictment, or otherwise, for what would be deemed a nuisance if it were not for the act.[5] A standard English treatise on criminal law[6] also states the law of nuisance by reference to old decisions as if it were entirely unaffected by modern regulative legislation. The unwillingness to surrender or abate common-law standards must be recognized as a characteristic of legal policy. But formal savings count for little in comparison with actual operation. The necessary practical effect of regulation

[1] 11 and 12 Vict. (1848) c. 63; Public Health Act, 1875.

[2] Secs. 91-98.

[3] Alkali and Works Regulation Act, 1906, secs. 2, 3, 4.

[4] Condensation of muriatic acid gas to the extent of 95%, each cubic foot of air escaping not to contain more than 1/5 of grain of muriatic acid.

[5] Alkali Act, 1906, sec. 29; Public Health Act, 1875, sec. 111.

[6] 2 Russell, *Crimes* (7th ed. 1909) 1833.

must be to supersede prior indefinite standards. The more effective must drive out the less effective rule, perfunctory declarations to the contrary notwithstanding. The non-enforcement of the general criminal law with regard to nuisances covered by legislative or administrative regulation confirms this view. In Oklahoma it is expressly provided[7] that "nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." This provision has been applied to a license granted by an administrative officer.[8]

(b) *Flexible terms and combinations in restraint of trade.* The Sherman Anti-Trust Act of 1890 punishes by fine and imprisonment every combination in restraint of trade or commerce among the states or with foreign nations, and all monopolizing of, or attempts or combinations to monopolize, such trade. "Monopolize," as the word is used in the Act, is satisfied by a virtual control of some branch of trade or industry; hence the term is one of degree, the percentage of the control that constitutes the virtual monopoly never having been definitely fixed.[9] Restraint of trade was at first interpreted as covering any scheme reducing competition between independent concerns, whether economically justifiable or not,[10] thus making the concept at least sufficiently definite if otherwise unworkable. This definiteness was subsequently sacrificed in favor of the "rule of reason" that was read into the law by the Standard Oil and Tobacco decisions,[11] and the illegality of restraint of trade was made to depend upon the undeterminable concept of public injury which had made the old criminal law of conspiracy odious and an instrument of abuse. It is interesting to note by way of contrast that the corresponding Australian Act of 1906[12] spoke of restraint of trade to the detriment of the public, and that these latter words were struck out by an amending act of 1910. In a case arising under the unamended Act the High Court of Australia protested against being asked to say

"what is the highest price at which coal could be sold without causing detriment to the public, with the result that if its *ex post facto* opinion should differ from that of the sellers they are liable to heavy penalties."[13]

[7] Rev. Laws Okla. 1910, sec. 4253.

[8] *Dupont Powder Co. v. Dodson* (1915) 49 Okla. 58, 150 Pac. 1085.

[9] The word "monopoly" has been used in the various senses of "complete control of a trade," "dominating influence in a trade," "practical control of a substantial part of a trade," "securing the greater part of a trade by keeping others out, whether by ordinary means of competition or otherwise," and "retaining possession of a trade actually enjoyed." *Adelaide S. S. Co. v. Rex* (1912, Aus.) 15 C. L. R. 65, 80.

[10] Traffic Agreement Cases, *United States v. Freight Assn.* (1897) 166 U. S. 290, 17 Sup. Ct. 540; *United States v. Joint Traffic Assn.* (1898) 171 U. S. 505, 19 Sup. Ct. 25.

[11] *Standard Oil Co. v. United States* (1911) 221 U. S. 1, 31 Sup. Ct. 502; *United States v. American Tobacco Co.* (1911) 221 U. S. 106, 31 Sup. Ct. 632.

[12] Australian Industries Preservation Act, 1906.

[13] *Adelaide S. S. Co. v. Rex, supra* note 9, at p. 97. The court thus disposed on

After the Supreme Court had given the Sherman Law an interpretation which made the criminality of acts dependent upon matter of degree and of opinion, it was contended that the acts so construed could not stand as a legitimate or valid exercise of legislative power. This contention the Supreme Court denied;[14] but it has sufficient truth in it to affect the actual administration of justice. The Department of Justice continued to prosecute criminally, but declared it to be its policy to proceed only in case of plain or intentional violations.[15] Even so its efforts have been attended by very indifferent success. It has failed in what were generally believed to be its strongest cases: the Cash Register Case,[16] in which criminal proceedings have been finally abandoned,[17] and the Nash or Naval Stores Case, in which after the reversal of the first sentence a new trial resulted in a verdict of not guilty.[18] None of the few sentences of imprisonment appear to have been carried into effect, verifying President Taft's statement that in the enforcement of a statute which makes unlawful, because of its evil tendencies, that which has been in the past regarded as legitimate, juries are not inclined by their verdicts to imprison individuals. Looking back over the history of the original enforcement of the law, it is difficult to escape the conclusion that Senator Sherman was right when at one stage of the passage of his bill through Congress he declared that in the present state of the law it was impossible to describe in precise language the nature and limits of the offenses in terms specific enough for an indictment, and that he was therefore clearly of the opinion that it was not wise to include penal sections in the bill.[19] The Clayton Act is a first step in specifying illegal practices condemned by the policy of the Sherman Law, and indicates the lines along which criminal legislation will have to proceed to satisfy the requirement of definiteness.

(c) *Flexible terms in labor legislation.* The use in factory laws of such terms as proper, suitable, adequate, necessary, sufficient, practicable, or reasonable, has often been commented on. The commissioner of labor of New York in his *Report of 1910* referred to the provision in the labor law for "proper and sufficient ventilation,"[20] which he considered practically inoperative without a definite rule-making power. With this law should be compared the health, safety, and comfort law

appeal of a case in which the trial judge had written a opinion covering over 250 printed pages establishing the fact and the intent of detriment to the public. *Rex. v. Associated Northern Collieries* (1911, Aus.) 14 C. L. R. 387-667. The Privy Council confirmed the reversing judgment of the Australian High Court. *Attorney General v. Adelaide S. S. Co.* [1913, P. C.] A. C. 781.

[14] *Nash v. United States* (1913) 229 U. S. 373, 33 Sup. Ct. 780.

[15] (1916) Rep. Atty. Gen. 24.

[16] *United States v. Patterson* (1915, C. C. A. 6th) 222 Fed. 599.

[17] (1916) Rep. Atty. Gen. 25. [18] (1914) Rep. Atty. Gen. 17.

[19] *Enforcement Provisions of the Sherman Law* (1912) 20 JOUR. POL. ECON. 462.

[20] Consol. Laws N. Y. 1909, ch. 31, sec. 86.

of Illinois, requiring 500 cubic feet of air space for each person employed, with other specified particulars.[21] "All vats, pans, . . . and machinery of every description, shall be properly guarded."[22] Letters of inquiry sent out by state officials elicited the common response that machinery was guarded as well as possible. "All doors . . . shall be so constructed as to open outwardly where practicable."[23] Of 1243 factories only 2½ per cent found it practicable to have their doors open outward. The Illinois law[24] leaves out the words "when practicable," and the like change was made in New York in 1913. An account of the labor law administration in New York says:

"The factory code contains extensive regulations concerning equipment and ventilation, safety of gangways, lighting, heat, accommodations for workers, condition of repair of tools and apparatus, and employment of women . . ., but has proven extremely difficult to enforce because such indefinite terms as 'suitable,' 'sufficient,' and 'properly' are used repeatedly instead of definite standards."[25]

This account has nothing to say on the enforcement of the law requiring seats for female employees and permission to use them, a silence easily understood in view of the provision requiring permission "to such an extent as may be necessary for the preservation of their health."[26]

It does not matter that in all these cases the flexible term is used objectively, that it is not the judgment of the employer which is meant to be conclusive, but in the last resort the judgment of the court or jury; for the first appeal is necessarily to the employer's discretion. and a court or jury is not apt to convict him criminally for what he may plead was an error of judgment.[27]

The objection to such terms as "proper," "sufficient," "suitable" in penal statutes applies only where these words enter as material ingredients into the description of the offense. Where without them the requirement is fully intelligible, their addition is harmless, and may simply emphasize the inadmissibility of a purely literal or evasive compliance. Thus it does not weaken a statute requiring an elevator shaft to be enclosed, to say properly or sufficiently or securely enclosed.[28] For the reason indicated the term "substantial" is nearly always unobjectionable.

A reference to practicability is a much more serious qualification, particularly since it has to be affirmatively established against the person charged.[29] Moreover, the objection to indefinite provisions

[21] Rev. St. Ill. 1911, ch. 48, sec. 99.

[22] *Id.*, sec. 80.

[23] N. Y. Labor Law, 1909, sec. 81.

[24] Rev. St. Ill. 1911, sec. 103.

[25] (1917) 7 AM. LABOR LEGISLATION REV. 331.

[26] N. Y. L. 1897, ch. 415, sec. 170, Consol. Laws N. Y. 1909, sec. 170.

[27] The experience in France has been the same; see Pic, *Traité élémentaire de legislation industrielle* (2d ed. 1902) sec. 637; Andre-Guibourg, Treatise on Labor Legislation, p. 181.

[28] Health, safety, and comfort law, Rev. St. Ill. 1911, ch. 48, secs. 89, 92, etc.

[29] *State v. Rodgers* (1910) 175 Ind. 25, 93 N. E. 223.

applies with full force mainly where the provision addresses itself directly to the individual, to be complied with under penalty. A different situation arises where there is an opportunity for administrative specification, and the operation of the law is such that the generic statutory injunction is thus particularized. Where this is the case, not only is the injustice or impracticability of the indefinite provision removed, but in a positive requirement, as distinguished from a restraint or limitation, the generic may be preferable to the specific form, because it interferes less with individual liberty and leaves room for private initiative in the choice of methods to produce the required result. A mere reference to this distinction must here suffice.

(d) *Indefinite terms in speed laws.* The former law of Illinois[30] forbade under penalties the operation of an automobile "at a speed greater than is reasonable and proper having regard to the traffic and use of the way, or so as to endanger the life or limb or injure the property of any person."

A similar provision was declared unconstitutional in Georgia as too uncertain and indefinite for enforcement, the words reasonable and proper constituting a dragnet rather than a definite standard.[31] In Ohio a similar provision was sustained, the court saying:

"The legislature wrote into the statute what has become known as the 'rule of reason' ever since the Standard Oil Case . . . and Tobacco Trust Case . . . were decided by the Supreme Court of the United States. In those cases the Supreme Court of the United States read into the statute the so-called 'rule of reason' holding that the Anti-Trust Act really was not a denial of all restraint of trade, but only a denial of unreasonable restraint of trade. It would hardly be suggested that the Supreme Court of the United States read into the statute something that made the statute unconstitutional, or read into the statute something that made it so indefinite and uncertain that it was incapable of advising the public as to what was or was not an offense under it, or that made the statute practically unenforceable."[32]

As has been demonstrated before, that is exactly what the Supreme Court did.

A somewhat less indefinite, though still flexible criterion is found in the British Motor Car Act, 1903, which penalizes driving

"recklessly or negligently, or at a rate of speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, and the nature, condition and use of the highway, and to the amount of traffic which actually is at the time, or which might reasonably be expected to be, on the highway"—

an elaborateness of statement obviously more for the protection of the driver than of the public, but for that very reason more appropriate to a penal statute than the opposite policy.

[30] Rev. St. Ill. 1911, ch. 121, sec. 269j.

[31] *Hayes v. State* (1912) 11 Ga. App. 371, 75 S. E. 523.

[32] *State v. Schaeffer* (1917) 96 Oh. St. 215, 230, 117 N. E. 220, 224.

Yet a due regard for the protection of the public demanded that the driver should be subject to less elastic restraints, and thus brought up the question of a fixed speed limit. This gave occasion to a spirited debate in the House of Commons, the most conspicuous instance of a parliamentary discussion of the issue: fixed versus flexible.

The automobile interests resisted a fixed limitation, and had at the beginning the support of the government, one of the principal arguments relied upon being that a maximum speed limit tended to become the normal rate, and was against the interest of safety, which required adjustment to varying conditions. On the other side it was pointed out that exclusive reliance upon the flexible terms recklessness, negligence, danger, etc., practically made the policeman the sole interpreter of the Act. The demand for the fixed limit proved so strong that the government finally yielded. The President of the Local Government Board, who had first insisted that a maximum speed tended to become the normal speed, now defended a high fixed maximum by the argument that whatever the maximum, the average speed would be little more than half. The final result was a speed limit of twenty miles, and the retention of the prohibition of reckless driving, the latter being more heavily penalized than the excess of the fixed limit.[33]

The laws of New York and Illinois combine the two methods of regulation by making the transgression of a fixed speed limit presumptive or prima facie evidence of the violation of the generic restraints of the respective acts. This solution of the problem was not suggested in England. In effect this means that any one who exceeds the fixed limits is prima facie guilty, but may exculpate himself by proving that under the circumstances the transgression was not reckless.[34]

The illustrations given are sufficient to establish the proposition that indefinite terms have failed or proved unsatisfactory in penal statutes. It matters little under these circumstances whether courts sustain them as constitutional or not.[35] From the point of view of broad constitutional principle, it may well be contended that the same principle which requires specification in indictments, requires specification in the statute which is the foundation of the indictment; and it should also be pointed out that the strong demand for the codification of the criminal law both in America and on the continent of Europe was largely inspired by the general abhorrence of undefined offenses, which found expression in Article 4 of the French Declaration of Rights of 1789.

But as a matter of legislative policy, the possible injustice to the individual counts perhaps for less than the proved futility of statutes which courts and juries are unwilling to enforce.[36]

[33] 126 Hans. 1487, 1507; 127 *id.* 413.

[34] See *People v. Beak* (1920) 291 Ill. 449, 126 N. E. 201.

[35] *Nash v. United States, supra* note 14.

[36] I have purposely omitted the consideration of recent legislation against

II. LEGISLATION CREATING CIVIL LIABILITY

(a) *Safety legislation.* If the controlling consideration against the use of flexible terms in penal legisiation is the resulting unenforceability of the law, flexible terms are not objectionable in the same way where the risk of an error of judgment as to the meaning of the statute consists in the incurring of a civil liability. A jury that will refuse to convict for a mistake may have no hesitation in giving a verdict for damages, particularly if the plaintiff is poor and the defendant is rich. The terms "safe," "sufficient," etc., which have proved unsuccessful in labor legislation for criminal purposes, have therefore presented no difficulty in litigation to enforce the employer's civil liability. On the contrary, labor interests will prefer generic terms as presenting better chances of recovering demages. The mining law of Illinois of 1911 required dusty haulage roads to be thoroughly sprinkled at regular intervals designated by the mine inspector, thus creating a specific duty.[37] The fear was at once expressed that the question of the sufficient frequency of the sprinkling might be no longer left to the jury, and the liability of the operator thereby reduced,[38] and at the next session of the legislature the law was amended by eliminating the reference to designation by the mine inspector.

The objection that indefiniteness of standards gives an advantage to the plaintiff at the possible sacrifice of justice to the defendant has never weighed strongly as against the claims of safety.

Particularly in the relation between railroad companies and the public an undefined degree of duty of care (a common-law, not a statutory duty) has been construed as a duty of the highest possible care with practically every presumption against the railroad company, resulting in an enormous increase in the safety of passenger transportation. If the conditions of the railroad business have perhaps in this respect been exceptional, it is because it is the one dangerous business with which the public is in constant contact; dangerous industries affect employes in the main, with regard to whom the duty of safety is qualified by the doctrine of assumption of risk. Recent workmen's compensation legislation has, however, placed the employe, in respect of the principle of liability, upon an even better footing than the railroad passenger.

This new legislation gives indeed the clue to the principle which makes a person civilly liable for an error of judgment upon a question of safety: it is that the privilege to carry on an enterprise may be

criminal anarchy and sedition. It operates with indefinite terms, and many convictions have been secured notwithstanding. The psychology of political legislation is abnormal, and it ought to be considered by itself. See my article on *Freedom of Speech and Press* in the NEW REPUBLIC of Feb. 16th, 1921.

[37] Rev. St. Ill. 1911, ch. 93, sec. 20, par. 15.

[38] See Thomas, *Changes in the Illinois Mining Law* (1912) 6 ILL. L. REV. 395, 399.

burdened with an absolute duty of insuring safety. An absolute duty is a definite duty and makes the flexibility of standards irrelevant.

If, however, after the establishment of such an absolute liability, the violation of duties is to be visited with penalties or additional liabilities, these duties should be specific duties. This was recognized by the supreme court of Ohio in the case of *American Woodenware Mfg. Co., v. Schorling*.[39]

The constitution of Ohio provides for workmen's compensation legislation taking away rights of action or defenses from employes and employers;[40]

"but no right of action shall be taken away from any employe when the injury, disease or death arises from failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of employes."

The question arose whether the term "lawful requirement" comprehends every duty imposed by common-law principles. The workmen's compensation act in force when the constitutional amendment was adopted, left unimpaired the employer's regular civil liability in case of an injury arising from failure to comply with a municipal ordinance or lawful order of any duly authorized officer or any statute for the protection of the life or safety of the employes. The court construed the term "lawful requirements" as referring to these specific enumerations.

"If the failure to comply 'with a lawful requirement' includes an act which was actionable negligence simply because of the rules of common law, then the portion of the section which authorizes the taking away of any or all rights of action or defenses of employes and employers would be practically meaningless and inoperative."

And a mere general duty imposed by statute stands on the same footing as a duty arising from the common law. For the industrial commission act of Ohio in terms requires every employer to furnish employment which shall be safe for the employes therein, defining safety as such freedom from danger as the nature of the employment will reasonably permit.

It seems clear that the decision of the Ohio court stands for the idea that after the rule of absolute civil liability has been satisfied, any further liability (which in that event is quasi-penal, being special and unlimited) should be predicated upon the violation of specific duties, and not upon the non-compliance with standards so general as to become matter of degree or of judgment.

(b) *Civil liability for injury suffered from monopolistic enterprises under the Sherman Anti-Trust Act.* The majority of actions brought (the total number has been small) has been for practices directed

[39] (1917) 96 Oh. St. 305, 313, 117 N. E. 366, 369.
[40] Const. Ohio (1851) Art. 2, sec. 35.

specifically against the complainant: refusal to sell; attempt to drive out of business; attempt to coerce into joining a combination; attempt to acquire control of voting power. These also constituted conspiracies against the plaintiff; and while the British House of Lords has denied that they are actionable, the actionability has been distinctly affirmed by the Sherman Act.

Only three of the cases have complained of injury suffered incidentally from the economic effects of monopolies, alleged to have been illegal, under the law, by reason of detriment to the public: in two of these[41] the pleadings were held sufficient, in one[42] damages were actually recovered. The difficulty of establishing a proximate causal connection between monopoly on the one side and on the other side particular loss of trade, or the enhancement of prices, or the deterioration of services, or the loss of employment, is such as to account for the paucity of cases and the improbability of their success. Could this difficulty be removed, the difference in point of justice would appear between a civil liability imposed by reason of engaging in an enterprise specifically forbidden by statute (e. g. consolidation of competing railroad lines) and one imposed by reason of a consolidation of concerns the legality or illegality of which is made to depend upon the speculative factor of detriment to the public. It is possible to say: you engage in industry at your peril so far as injury to employees, or injury to adjoining land owners is concerned; but it is an economic absurdity to say: you may expand your business upon condition of indemnifying against all incidental economic losses. The fairness of absolute liability is the test of justice in making indefinite standards the basis of civil liability.

(c) *Trustee's civil liability.* The English Settled Land Act, 1882, gives a power of sale to every tenant for life, who for the purposes of the Act is a trustee.[43] The Act provides that every sale shall be made at the best price that can reasonably be obtained.[44] In favor of a purchaser in good faith a conclusive presumption is created that the price paid is the best price, but not in favor of the life tenant, as far as his liability to the remainderman is concerned. The Trustee Act, 1893, provides that no sale made by a trustee shall be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.[45] Thus the statutes seem to recognize a civil liability for inadequacy of price obtained,—surely a matter of error of judgment. This is the more surprising, as in even the hardest cases in which courts of equity had held trustees liable to beneficiaries, there had nearly always been a technical violation of duty or at least what the court

[41] *Monarch Tobacco Works v. American Tobacco Co.* (1908, W. D. Ky.) 165 Fed. 774; *Ware-Kramer Tobacco Co. v. American Tobacco Co.* (1910, E. D. N. C.) 180 Fed. 160.

[42] *Chattanooga Foundry v. City of Atlanta* (1906) 203 U. S. 390, 27 Sup. Ct. 65.

[43] Sec. 3. [44] Sec. 4. [45] Sec. 14.

regarded as a plain neglect of a testamentary direction.[46] A liability beyond this—based on honest mistake—has been enforced by courts of equity only in rare instances.[47]

The clear tendency of English legislation has been to relax the strictest rules of the trustee's liability and to make some duties specific while relieving him from others. Jessel, M. R., said of section 37 of the Conveyancing and Law of Property Act, 1881, (giving trustees power to pay, compromise, etc., without responsibility for loss occasioned by anything done in good faith) that it would have a revolutionary effect on this branch of the law. This, however, was superseded by the Trustee Act, 1893. In 1896 a sweeping provision was enacted permitting a court to relieve a trustee where he has acted honestly and reasonably and ought fairly to be excused for the breach of trust.[48] If the provisions first cited involve untenable principles of liability, there is at least a statutory power of giving full relief.

III. INDEFINITE REQUIREMENTS AND THE SECURITY OF TITLES

Reference has been made to the provision of the English Settled Land Act, 1882, section 4, requiring that a sale made by a life tenant under the power given by the Act must be made at the best price that can reasonably be obtained. Sales would become impossible in the absence of further provision, if their validity were made dependent upon compliance with this requirement; hence the further provision in section 54 that in favor of a purchaser in good faith the price paid is to be taken conclusively to be the best price obtainable. This example will illustrate the impracticability of making titles dependent upon requirements the meaning of which varies with differences of judgment or discretion.

A further example: it is sometimes said that a condition against alienation is valid, provided it is reasonable. Can a rule of validity be thus circumscribed? Suppose the condition is against alienation to persons of Japanese nationality. If only Japanese will buy in that neighborhood, the condition becomes unreasonable, with the effect that a Japanese can buy; but he takes the risk that a court may hold the condition reasonable, and therefore buys the risk of a lawsuit. Therefore he will not buy. The condition is therefore practically effective though unreasonable, the uncertainty of the test of validity being fatal to the rule against unreasonable conditions; to strike at unreasonable conditions, it is necessary to make all conditions against alienation absolutely void. The rule of reasonableness has been strongly criticized in England.[49]

[46] *Sculthorpe v. Tipper* (1871) L. R. 13 Eq. 232.

[47] *Dickinson, Appellant* (1890) 152 Mass. 184, 25 N. E. 99.

[48] Judicial Trustee Act, 1896, sec. 3.

[49] *Re Rosher* (1884) L. R. 26 Ch. 801; see Gray, *Restraints against Alienation* (2d ed. 1895) secs. 31-44.

It was held in England that where a power was given to distribute property among children in such shares as the holder of the power should direct, each child should be entitled to a substantial share; an appointment to what was called an illusory share was invalid. The doctrine was found so inconvenient that the legislature interfered by providing that in future no appointment might be objected to on the ground of its being illusory;[50] and in America the doctrine has been likewise abolished by statute[51] or repudiated by the courts.[52]

The doctrine of implied revocation of wills was finally worked out in England as meaning that revocation would result from subsequent marriage and birth of issue if the testator failed to make substantial or adequate provision for the wife and issue,[53] thus making revocation a matter of the greatest uncertainty. Again the legislature interfered and made the simple provision that every will should be revoked by the subsequent marriage of the testator[54]—a provision adopted in a number of American states.

There are at least two instances in the early English law of property in which indefinite provisions have yielded to definite ones. Magna Charta provided that no man should give or sell any more of his land but that of the residue the lord might have the service due him; in 1290 this was superseded by the absolute prohibition of subinfeudation.[55] And the "reasonable part" of the widow in time became one-third.

Where the correct exercise of judgment enters into the exercise of rights or powers affecting title as a condition of validity, it is necessary to afford statutory facilities for immediately determining the matter of judgment. The statute of Illinois permits adoption where it is for the best interest of the child.[56] This is a practicable condition because adoption is effected through a judicial proceeding which at once settles the question of best interest; it would be impracticable if adoption were effected by deed, as it was until recently in Missouri.[57]

In similar manner, the flexible term may be harmless where an authoritative determination must in the nature of things be speedily forthcoming. British legislation has for some time enlarged the rights of the agricultural tenant against the landlord. The Irish Land Act, 1881, carefully enumerated the conditions for the breach of which the tenant might be compelled to quit.[58] For England the Agricultural Holding Act, 1908, gives the tenant a right to compensation if the landlord "without good and sufficient cause and for reasons inconsis-

[50] 11 Geo. IV & 1 Wm. IV (1830) c. 46; see *Gainsford v. Dunn* (1873) L. R. 17 Eq. 405; also 37 & 38 Vict. (1874) c. 37.

[51] Consol. Laws N. Y. 1909, ch. 50, sec. 138.

[52] *Hawthorn v. Ulrich* (1904) 207 Ill. 430, 69 N. E. 885; *Ingraham v. Meade* (1846, U. S. D. C. D. Ga.) 3 Wall. Jr. 32.

[53] *Israell v. Rodon* (1839) 2 Moore P. C. 51.

[54] Wills Act, 7 Wm. IV & 1 Vict. (1837) c. 26.

[55] Statute Quia Emptores (1290).

[56] Rev. St. Ill. 1919, ch. 4, sec. 3.

[57] See Rev. St. Mo. 1909, sec. 1671; L. Mo. 1917, p. 193.

[58] Sec. 5.

tent with good estate management" terminates a tenancy by notice to quit or refuses to grant a renewal;[59] and the Scotch Small Landholders Act, 1911, gives a right to renewal unless there is reasonable ground or objection to the tenant.[60] These provisions undoubtedly make the right of the landlord entirely a matter of judgment, but the English Act gives a speedy remedy by arbitration, and under the Scotch Act the question must necessarily be brought to an issue at the termination of the old tenancy. There is no possibility of rights being kept in an uncertain condition for a considerable period of time.

And it may be generally observed for American legislation that wherever the law affects the devolution of titles by testamentary disposition, the objection to indefinite terms is largely overcome by the fact that the normal course of administration results in a judicial settlement of accounts. This has not in the past been true of either English or continental legislation. Even under such a state of the law, however, indefinite terms inevitably invite and produce litigation and the waste and expense connected with it.

IV. OBLIGATIONS OR RESTRICTIONS OPERATING THROUGH EQUITABLE RELIEF

There is very little hardship in civil obligations of flexible content which are enforced through equitable relief and not through liability in damages. The British Money Lenders' Act, 1900, is typical. It authorizes a court to reopen a transaction and take an account where it is satisfied that charges are excessive, or that the transaction is harsh and unconscionable or otherwise such that a court of equity would give relief. The German Civil Code, which renders usurious transactions null, defines them more carefully as transactions in which one party, exploiting the distress, improvidence, or inexperience of another, stipulates pecuniary benefits so much exceeding the consideration that according to the circumstances there is a striking disproportion between the two.[61]

Another illustration is furnished by a provision of the German Civil Code concerning easements.[62] If an easement concurs with another easement in the same land so that both rights cannot be enjoyed or fully enjoyed together, and if they are of equal rank, each party may demand an adjustment of the exercise of the rights which reasonably satisfies the interests of all. The whole matter being left to equitable adjustment, flexible terms are properly used.

V. FLEXIBLE TERMS AND GRANTS OF OFFICIAL POWER

The distinguishing feature in this class of cases is that the language of the statute is addressed in the first instance to public officials, and not to private individuals.

[59] Sec. 11.
[60] Sec. 32.
[61] German Civil Code (1900) Art. 138.
[62] Art. 1024.

The use of indefinite or flexible terms in the grant of official powers means the grant of discretionary powers. Official discretion may tend to become arbitrary or unwise discretion, and may on that ground be politically objectionable; but a statute does not for that reason alone become unworkable, and there is on the contrary a general impression that from the point of view of technical operation, there can be no harm in using general terms to indicate the scope of statutory power or jurisdiction.

Applying again the test of the risk of error and of who bears it, it appears that in the exercise of either administrative or of subordinate legislative power an erroneous interpretation simply makes the exercise of the power invalid, without of its own force exposing the individual to penalty or liability and without disturbing or unsettling titles. The exercise of the power advises the individual specifically of what his course of action is expected to be, and it is not unfair to throw upon him the risk that attends non-compliance on his part if he proposes to rely upon the invalidity of the official act. He has the chance of its being declared invalid; on the other hand, there is the chance that a liberal construction of power may be ultimately sustained by the court, with a consequent gain to public authority and to the public policy which it represents. The question resolves itself into this: is the chance of validity worth more than the risk of invalidity? And ordinarily it is. This is the general aspect of official powers expressed in flexible terms; but a closer examination shows that in some types of cases different issues arise, and that in exceptional cases flexible terms are unworkable even in the grant of official powers. Practical examples will illustrate the rule and its exceptions.

The rule. The rule can best be illustrated by contrasting grants of official power with cases in which flexible terms have proved unworkable. The penal provisions of labor statutes operate unsatisfactorily where duties are prescribed merely by reference to danger or injury; but there can be no objection to authorizing labor officials to order the safe-guarding of dangerous machinery or to withhold child labor certificates in case of occupations injurious to health or morals. Such discretion may be objectionable for other reasons, but it would not constitute a technical defect. It would never do to authorize the heir to convey the decedent's property free from any claim under an undiscovered will, after a period of time depending upon circumstances, but it is possible to authorize a court to declare that there are no heirs and that consequently there is an escheat, after a period thus indicated.[63] While it is impracticable to make the validity of adoption by deed dependent upon the interests of the child, that is a common provision where adoption can only be effected by order or consent of court. A board may be given power to vary a rate on an application of workmen or employers which appears to the board to represent any considerable

[63] German Civil Code (1900) Art. 1964.

body of opinion amongst either workmen or employers;[64] a board or commission may be authorized to select for minimum wage inquiries, occupations in which substantial numbers of women are engaged;[65] a board may be authorized to take certain precautionary measures if a district is threatened with a formidable epidemic or infectious disease. In these cases a risk of error in either direction will leave the matter where the legislature, in its discretion, might have placed it without prejudicing plain equities. A qualification by way of abundant caution may always be couched in flexible terms.

It is instructive to compare the terms restraint of trade and monopoly in anti-trust acts with the term unfair competition in the Trade Commission Act. The latter Act proceeds entirely through administrative orders, and the individual is not called upon at the peril of penalty or civil liability to determine in the first instance whether a practice is or is not unfair under the Act. While the Act declares unfair methods of competition unlawful, it makes no provision for direct judicial redress either civil or criminal. The Trade Commission was designed, as expressed by its chairman, not as a punitive, but as a corrective force.[66] Any success that the Sherman Act has had has been almost exclusively through the proceedings in equity which are somewhat in the nature of prospective administrative proceedings and have been so administered by the court. The minimum wage acts likewise have been able to operate with the most general phrases because they do not operate without those phrases being first defined administratively. It is true that some of these acts in terms appear to make the violation of the general clauses an offense,[67] but this is an inadvertence without practical effect; and if it is true that the individual is exposed to the risk of administrative error, that risk is inevitable and not as great as the risk of a legislative error, if the rate were directly fixed by statute at a specific amount.

The exceptions. 1. It is the chance of beneficial latitude of interpretation that recommends the grant of power in general or flexible terms; if for any reason that chance fails, there is no advantage in the flexible term. It is necessary to reckon with an official unwillingness to assume the responsibility of discretion; if there is that tendency, it may turn out that the gain from flexibility is illusory. To illustrate:

It is not uncommon to lay down reputability as a statutory qualification for being recognized in connection with semi-official acts (licenses, petitions, endorsements, etc). "Reputable" is intrinsically a term of degree, if not one of judgment; it seems to involve a wide latitude. But no official would undertake to hold a person not reputable on the basis of rumor or even of ordinary private statements. Nothing will

[64] British Coal Mines (Minimum Wage) Act, 1912, sec. 3 (2).
[65] Acts Mass. 1912, ch. 706, sec. 3.
[66] (1916) 102 COM. & FIN. CHRON. 128.
[67] 2 Ore. Laws 1920, sec. 6684; cf. Gen. Laws Calif. 1915, act 1608, sec. 11.

practically count against reputability except a judicial conviction, and by converse reasoning, a previous conviction may be treated as establishing lack of reputability. It would be much better to name previous conviction as a disqualification or as a basis for the exercise of unfavorable discretion, and thus fairly to face the question whether one conviction should be allowed to have such far reaching effect. Here the flexible term brings no advantage.[68]

This is perhaps the most conspicuous case of the kind; but it will be remembered that upon a very similar principle, the phrase "during good behavior" has acquired the settled meaning of "for life, unless misconduct be judicially proved."

2. There is no benefit in flexibility of expression if there is every chance of its operating in the direction of illiberality. Generic or flexible terms of distinctly restrictive connotation are therefore less desirable than fixed or specific terms. Advocates of municipal home rule desire charter powers in general terms; to a specific enumeration of the subjects on which the council may enact ordinances they prefer a power of "local" or "municipal" legislation. But they would repudiate the expression "strictly local" or "strictly municipal," which would in advance resolve every doubt against the local power. Such forms are appropriate only where the legislature makes a concession with the consciousness of its undesirability.

The cities act of Illinois requires the levy of the amounts of appropriations by a tax levy ordinance "specifying *in detail* the purposes for which such appropriations are made and the sum or amount appropriated for each purpose respectively."[69] Tax levies have repeatedly been held invalid for lack of sufficient specification,[70] and it would certainly be in every respect advantageous if the statute itself specified more in detail its own requirements. Suppose a similarly worded requirement for the validity of a municipal bond issue; no bond issue would be possible without a previous judicial determination of compliance with the requirement.

3. Reference has been made to the advantage from the point of view of home rule of having broad grants of a municipal powers. This principle was however misapplied in California. The constitution of that state provided from 1896 to 1913:

"Cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution (except in municipal affairs) shall be subject to and controlled by general laws."[71]

[68] The Victoria (Aus.) minimum wage act, 1903, defined a minimum wage by reference to wages paid by reputable employers; in 1907 this was abandoned, it having been found too difficult to determine reputability.

[69] Rev. St. Ill. 1919, ch. 24, sec. 111.

[70] *People v. Ry.* (1911) 252 Ill. 372, 96 N. E. 864.

[71] Const. Calif. 1896, Art. 11, sec. 6.

The exception to the rule of subordination for municipal affairs gave rise to a great deal of difficulty. In 1913 an amendment was adopted giving cities powers to make regulations in respect to municipal affairs subject only to the restrictions of their charters, and in respect to other matters subject to general laws. It has been said[72] that the amended phraseology changes the implication from a negative to a positive character, but whatever the meaning of that may be, it leaves the real difficulty untouched.

Why is it that a general grant of power of municipal regulation is beneficial, and that a grant of power subject, except in municipal affairs, to general laws, has been mischievous? The reason is that indefiniteness which may be desirable in the grant of a subordinate positive power, is extremely undesirable in defining the relations between two competing powers. The risk of erroneous interpretation in the former case is the invalidity of an ordinance; the individual may escape any risk by submitting to the doubtful ordinance. But in the latter case the risk of erroneous interpretation results in a dilemma; no one knows whether the state law or the local law prevails; it is not a matter of valid or void, but of conflict and duplicity. The relation of supremacy and subordination in competing jurisdictions demands a simple and clear cut rule; flexibility is of evil, because it results in confusion. Flexible terms, in other words, are even in the grant of official power undesirable where the risk of error is a choice between penalties.

CONCLUSION

It has been said that the strength of a statute lies in its general phrases. The foregoing analysis shows that this is a half truth, for there are statutes whose general phrases constitute their weakness. Here as elsewhere closer examination reveals the need of discrimination. But the statement may be hazarded that where the legislative policy is to confer specific benefits and not merely benefits of a very general public character, and the corresponding detriment or prejudice to interests is vague and speculative, general phrases are to be preferred; where, on the other hand, the policy is primarily restrictive or one of grudging concession, fixed and definite terms should be chosen.

Presumptively, flexible terms are more appropriate to civil than to criminal legislation. And this principle is applicable not only to the contrast between fixed and flexible, but to all the varying grades of generic and specific definition.

To illustrate: prima facie we should say that the recognition of intangible property rights, a beneficial extension of the protection of interests, should be given by law in terms of general import. Legisla-

[72] (1913) 1 CALIF. L. REV. 457.

tive history confirms this. Under the power given to it by the federal Constitution, Congress legislated as early as 1789 on the subjects of patent and copyright. The protection of the patent law was given to any new and useful art machine, manufacture, or composition of matter. This definition, using the most general terms, stands today as it was originally framed, and while inevitable doubts have arisen as to the meaning of the law, they could probably not have been avoided by more elaborate definition. For the protection of copyright the system of specification was adopted: with what result? The act of 1789 spoke of maps, charts, and books; there were added in 1802, designed, engraved, and etched prints; in 1831, musical compositions; in 1856, dramatic compositions; in 1865, photographs; in 1870, painting and statuary. Finally in 1909 the method of specification was abandoned: section 4 of the new Act[73] speaks simply of "writings" (it is plain from the proviso in section 5 that this word is an error and that "works" was intended), and the specifications given in section 5 are expressly declared not to limit the subject-matter of copyright, which now finally covers literary and artistic property in general. So the English Act of 1911[74] speaks of every original literary, dramatic, musical, and artistic work. Thus in the long run the superiority of the general term has asserted itself for this species of enabling legislation.

[73] 35 St. at L. 1076.

[74] Copyright Act, 1911, sec. 1 (1).